UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	*Criminal No. 95-9-P-H*
	)	
DAVID BIZIER,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

The defendant is charged in a one-count indictment with possession of, with intent to distribute, five grams or more of a substance containing cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). He seeks the suppression of the following: (i) any statements made by him during a stop of his truck on the Maine Turnpike on January 23, 1995, (ii) cocaine base seized during a warrantless search of his person on the same date, (iii) a written statement (Dft's Exh. 1) he made after the body search and his arrest, and (iv) evidence seized from a warranted search of his truck on January 24, 1995. An evidentiary hearing was held on May 12, 1995. I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

In early January 1995, a confidential informant ("CI") contacted the Maine Drug Enforcement Agency ("MDEA") and stated that s/he wanted to talk to the authorities about drug trafficking in the Lewiston-Auburn area. Special Agent Joseph Bradeen, a Lewiston Police Department officer assigned to the MDEA, knew of the CI as a crack cocaine user in that area.

Before meeting with the CI, Agent Bradeen investigated the CI's background and learned that s/he had previous convictions for prostitution, criminal mischief and criminal trespass. He was not aware at the time that the CI also had been convicted for filing a false report. However, it was Bradeen's understanding that the CI had no then pending criminal charges.[1]

Agent Bradeen first met with the CI soon after receiving the CI's call. At that meeting, the CI explained that s/he had stopped using cocaine and wanted to help rid the Lewiston-Auburn area of drug dealers. During that meeting and each of several subsequent meetings with the CI during January 1995, Agent Bradeen, who was familiar with the behavior of persons under the influence of crack cocaine, observed the CI and concluded that s/he was not on those occasions under the influence.

The CI told Agent Bradeen that s/he could buy crack cocaine from the defendant at the defendant's apartment and agreed to make a controlled purchase. The first of two such "buys" took place on January 12, 1995. On that occasion, the CI was searched for contraband, fitted with a bodywire, given prerecorded funds with which to accomplish the buy and driven in Bradeen's unmarked police car to the defendant's three-story apartment building, which is located in Lewiston at the corner of Bartlett and Willow Streets.

In order to gain access to the building without a key, one has to be either buzzed in or admitted by someone opening the door from the inside. Agent Bradeen observed the CI leave his car and approach the building. Bradeen saw through a second floor hallway window a woman he later learned was the defendant's girlfriend, Marie Lessard, leave the defendant's apartment. Bradeen

[1] Agent Bradeen has since learned that after January 1995 the CI was charged with criminal activity, but not any involving drugs. The authorities have never paid the CI anything or promised the CI any remuneration or favor for the CI's assistance.

watched the CI enter the building moments later and the CI and Lessard enter the defendant's apartment. Although the recording made of the bodywire transmission did not permit Agent Bradeen to hear details of the conversation that took place in the defendant's apartment, Bradeen could hear a male voice on the tape. Within approximately 3 minutes, Bradeen saw the CI leave the defendant's apartment, exit the building and reenter Bradeen's car. Bradeen drove to a secluded area where he conducted another search of the CI and determined that the only item on the CI's person was a substance appearing to be crack cocaine, which the CI told Bradeen s/he had received from the defendant in exchange for payment of the prerecorded funds. The substance was field tested within an hour thereafter at a Maine State Police field station and determined to contain cocaine. A subsequent laboratory test disclosed that it was crack cocaine weighing .3 grams.

A second controlled buy took place on January 19, 1995 following the same preparatory scenario just described. This time, when the CI approached the building Agent Bradeen observed the defendant leave his apartment and personally open the door to the building to admit the CI. Within a minute of entering the defendant's apartment, the CI left there, exited the building and reentered Agent Bradeen's car. The bodywire recording of this event allowed the agents to hear bits and pieces of conversation, but they were unable to make out the dialogue. The same post-exit scenario followed as with the first controlled buy. The CI told Agent Bradeen that s/he had obtained from the defendant a bag containing a substance appearing to be crack cocaine which s/he handed over to him. It, too, was field tested within an hour thereafter and found to contain cocaine. A later drug analysis disclosed it to be crack cocaine weighing .6 grams.

During the late afternoon of January 23, 1995, while Agent Bradeen was meeting with the CI at the CI's home, the CI received a telephone call from an individual s/he later identified as Marie Lessard, the defendant's girlfriend. Although Bradeen was able to hear only the CI's side of the conversation, what he did hear was wholly consistent with what the CI reported Lessard to have told the CI. According to the CI, Lessard reported that the defendant had gone to Massachusetts to buy crack cocaine and that he would return that day at approximately 6:00 p.m. Agent Bradeen, who knew that the defendant drove a Ford truck, obtained full registration information on the truck, including style (pickup), color (black and silver) and plate number (2689 BJ), and relayed it to the State Police at its Gray barracks with his estimate as to when the truck was expected to enter the Maine Turnpike northbound. He requested the barracks dispatcher to have the State Police stop the truck, explaining that there was probable cause to believe it was carrying contraband.

Maine State Police Trooper Kevin Curran received a call after 5:00 p.m. while at the Maine State Police substation at Mile 43 of the Maine Turnpike reporting that the defendant's truck had just entered the turnpike northbound. All of the registration information obtained by Agent Bradeen and related by him to the barracks dispatcher was in turn passed along to Trooper Curran. In addition, Curran was told by the dispatcher that there was second person in the vehicle, that there were unidentified drugs in the vehicle and that Agent Bradeen wanted the vehicle stopped. At 5:20 p.m. Curran gave the same information to Trooper Charles Granger, who was on patrol on the turnpike. The two troopers took up positions just below northbound Exit 6A to await the appearance of the defendant's truck. At approximately 6:00 p.m. Trooper Curran spotted the truck. Although he had been told that the truck's color was black and silver, it appeared to him in the dark to be brown, but its license plate number, which he was able to see clearly on both the front and rear plates, matched

the one given him by the dispatcher. The truck was traveling at a speed of between 62 and 65 miles per hour in a 55-mile per hour speed zone. Curran saw two people in the passenger compartment of the truck and observed that the driver was a male.

Trooper Curran pulled onto the travel lane behind the truck and activated his blue lights and flashing headlights. The truck took approximately 1/8 of a mile to pull over after the lights went on, described by Curran as an unusually long time. Trooper Curran confirmed the plate number after the truck stopped. Curran approached the vehicle on foot and obtained license and registration documents from the driver, whom Curran identified as the defendant. The registration indicated the truck was black and silver.[2] Trooper Curran observed the defendant to have glassy eyes with pinpoint pupils. When asked to step out of the truck, the defendant swayed as he stood in front of the truck and avoided looking at the trooper. When asked where he was coming from, the defendant variously stated that he was in Biddeford looking for work and working in Biddeford at a church as a drywaller, but was unable to name the person or company who had hired him. He denied consuming any intoxicating beverages or narcotics. Trooper Curran then spoke with the passenger, later identified as Randy Hall, at the passenger side of the truck. When asked, Hall stated that he and the defendant had been in Portsmouth, New Hampshire just riding around and that they had met friends, although he could not name any of them.[3] Hall was clear that he and the defendant had been nowhere else but Portsmouth.

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[2] Trooper Curran, an accident reconstruction expert, noticed that the truck had recently been repainted a brown color.

[3] Hall had already told Trooper Granger, who also approached the truck on foot after the stop, that he and the defendant had been at a friend's house in Portsmouth.

Trooper Curran next told the defendant that he had received conflicting information from him and Hall as to where they had been and stated that he suspected there were drugs in the truck. The defendant offered to have the trooper search the truck. Curran explained to the defendant that he did not want him to consent to a vehicle search unless he was doing so voluntarily and that the defendant did not have to consent. At this point, the defendant volunteered that there was a marijuana joint in the ashtray. The trooper told the defendant that a drug detection dog was on its way, explaining further that the defendant could stop a consent search at any time. He gave the defendant a written consent form and determined that the defendant could read and write. He then invited the defendant to read the form and sign it if he still consented to a vehicle search. The defendant read and signed the form.[4]

The interior and exterior of the truck were sniffed by a drug detection dog named "Zack" who was brought to the scene by his handler, South Portland Patrol Officer Allen Andrews.[5] The dog only alerted to the front edge on the right side of the driver's seat, near the ashtray, and to a cardboard box that had been removed from the seat of the truck. No drugs were found in the cardboard box. At no time during this canine search did the defendant indicate that he wanted the search to stop.

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[4] Although the original form is missing, a pre-execution carbon copy is in evidence as Govt. Exh. 3.

[5] Officer Andrews has worked with Zack for over five years, during the last three of which the dog has been a certified narcotics detection dog. Andrews is a certified handler. Both Zack and Andrews are recertified every 6 months. The dog has never been asked to search people and was not asked to search the defendant on this occasion. On one occasion preceding the canine search of the defendant's vehicle, Zack failed to alert to the presence of narcotics located under the back seat of a vehicle. It has alerted when in fact no narcotics have been present, but only in circumstances where it was later determined that narcotics were present in those locations a short time prior to the dog's search. Zack will alert even if only the residue of narcotics is present.

At this point, Trooper Curran decided to secure the truck and apply for a search warrant.[6] A tow truck towed the vehicle to a State Police garage, followed by Trooper Curran who secured the vehicle by taping it upon its arrival there. In the meantime, Trooper Granger transported the defendant and Hall to Crosby Farms, a South Portland substation located approximately 200-500 yards from the stop site, in order to get them off the road while he called Agent Bradeen.[7] Granger did not place any restraints on the two and did not place either of them under arrest at this point. The defendant and Hall never objected to being taken to Crosby Farms. A total of 20 to 30 minutes lapsed between the time the defendant's truck was first stopped and he and Hall were transported to Crosby Farms. Once inside the substation building, the two men were kept in separate rooms.

Trooper Granger spoke to Agent Bradeen approximately 30 minutes after arriving at the substation. Bradeen told him there was probable cause to do a complete body search of the defendant and Hall. Granger then proceeded to do a full body search of the defendant and, in the process, pulled from the defendant's underpants a transparent plastic bag containing onions, peppers and individual transparent plastic bags containing a substance determined later on laboratory analysis to be cocaine base weighing in the aggregate 32.2 grams. The parties have stipulated that *Miranda* warnings were properly given to the defendant after the crack cocaine was discovered and that the defendant thereafter gave his otherwise lawful written statement (Deft's Exh. 1) as well as oral statements. The defendant's truck itself was searched on January 24, 1995 pursuant to a warrant issued on the same day. The parties have also stipulated that the only drug found in the vehicle

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[6] Curran explained that he did this consistent with his practice in similar circumstances and because he had not yet had an opportunity to speak directly with Agent Bradeen.

[7] Trooper Curran testified that as a matter of State Police policy and procedure, individuals whose vehicles are seized are not left on the Maine Turnpike.

search was the marijuana joint in the ashtray which the defendant had told Trooper Curran during the turnpike stop was there. The parties agreed at oral argument that at no time prior to the discovery of drugs on the defendant's person was he placed under arrest.

II. Legal Discussion

The defendant first challenges as impermissible the police decision to stop his vehicle as it travelled on the Maine Turnpike. It is well established under Fourth Amendment jurisprudence that police may make an investigatory stop of an individual if they have an articulable and reasonable suspicion that the person has just committed a crime. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *United States v. Quinn*, 815 F.2d 153, 156 (1st Cir. 1987). Such an investigatory stop constitutes a "seizure" and is thus regulated by the Fourth Amendment's proscription against unreasonable seizures. *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *United States v. Kimball*, 25 F.3d 1, 5 (1st Cir. 1994). In evaluating the reasonableness of an investigatory stop, the Supreme Court has established a two-part inquiry. *Sharpe,* 470 U.S. at 675. "[T]he court must first consider whether the officer's action was justified at its inception; and second, whether the action taken was reasonably related in scope to the circumstances which justified the interference in the first place." *Kimball*, 25 F.3d at 6 (1st Cir. 1990) (citations and internal quotation marks omitted). "It should be kept in mind that when applying this test and assessing the reasonableness of the police officer's actions, the court must consider the totality of the circumstances which confronted the officer at the time of the stop." *Id*. (citations omitted).

I conclude that the state troopers who conducted the *Terry* stop had a suspicion that was both reasonable and articulable. This is so because the information provided by the CI was sufficient to

give the police probable cause to believe the vehicle was being used to transport illegal drugs into Maine. *See, e.g.*, *United States v. Streifel*, 781 F.2d 953, 957 (1st Cir. 1986). That the troopers did not arrest the defendant on the spot is consistent with the conservative approach adopted during the *Terry* stop by Trooper Curran, who had not yet received the details of the MDEA investigation.

"Probable cause to make an arrest exists where the facts and circumstances of which the arresting officer has knowledge would be sufficient to permit a reasonably prudent person, or one of reasonable caution, to conclude that an offense has been, will be, or is being, committed." *United States v. Cruz Jimenez*, 894 F.2d 1, 4 (1st Cir. 1990). It is irrelevant that the troopers at the scene lacked all of the relevant information at the time they stopped the defendant; "[i]t is enough that the collective knowledge and information of all the officers involved establishes probable cause for [an] arrest." *United States v. Paradis*, 802 F.2d 553, 557 (1st Cir. 1986) (citations omitted). I cannot agree with the defendant that the CI lacked sufficient credibility to allow the investigators to rely on the information s/he had given them. Consistent with the totality-of-the-circumstances framework adopted by the Supreme Court for evaluating probable cause, it is not appropriate to apply any rigid test to the information provided by an informant. *See Illinois v. Gates*, 462 U.S. 213, 232 (1983). Here, although the reliability of the CI is attenuated by that person's own use of illegal drugs, it is buttressed by the circumstances surrounding the controlled buys at the defendant's residence. And, as in *Gates*, the CI accurately predicted the defendant's movements. *Id.* at 245; *see also United States v. Diallo*, 29 F.3d 23, 26 (1st Cir. 1994).

Thus, reliance by the authorities on this information was reasonable, and the defendant's appearance in the northbound lanes of the turnpike as expected gave rise to an articulable and reasonable suspicion sufficient to warrant a *Terry* stop. *Streifel*, 781 F.2d at 957. All the more so,

of course, when the troopers observed the defendant exceeding the posted speed limit. Further, the scope of the *Terry* stop, particularly its length and the decision to conduct a canine "sniff" of the defendant's vehicle, was reasonable in the circumstances and did not convert the stop into an arrest requiring *Miranda* warnings. *See Quinn*, 815 at 157-58 (officers had reasonable grounds, approaching probable cause, for suspicion that defendant carrying illegal drugs; 20-25 minute wait for canine "sniff" reasonable to permit officers to confirm or dispel suspicions).

I also conclude that the strip search conducted of the defendant at the state police substation also did not violate the defendant's Fourth Amendment rights and that the search was a valid one incident to arrest. At this point, Trooper Granger had explicitly confirmed with MDEA Agent Bradeen that there was probable cause to arrest the defendant. However, at oral argument the defendant took the position that the search was improper because the police had not yet formally placed him under arrest. This is not a correct statement of the law. The Supreme Court has held that when formal arrest follows "quickly on the heels" of the challenged search, it is not "particularly important that the search preceded the arrest rather than vice versa." *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) (citations omitted). Probable cause must exist prior to the search; the police may not use the fruits of the search itself to support the determination of probable cause. *Smith v. Ohio*, 494 U.S. 541 (1990); *United States v. Potter*, 895 F.2d 1231, 1234 (9th Cir.), *cert. denied*, 497 U.S. 1008 (1990).

By the time Trooper Granger conducted the body search, the police had more than enough probable cause to arrest the defendant. In addition to the information supplied by the MDEA, the troopers had directly observed the defendant's unusual demeanor and had noted the inconsistent stories given by the defendant and his travelling companion. The defendant had volunteered the

presence of a marijuana joint in his car; the drug detection dog had alerted during the canine "sniff" of the defendant's vehicle. The totality of these circumstances was sufficient to warrant a prudent person in believing that the defendant had committed an offense, and thus both the arrest and the search of the defendant was lawful. *United States v. Uricoechea-Casallas*, 946 F.2d 162, 165 (1st Cir. 1991).

Finally, the defendant took the position at oral argument that he is entitled to suppression of all statements he made to the police during the *Terry* stop because the troopers did not administer *Miranda* warnings until after they conducted the body search and placed him under arrest. I disagree. In the course of conducting a *Terry* stop, a police officer "may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). The questions posed by the troopers along the turnpike, seeking to identify the defendant and discern where he had been, were precisely of this nature. The posing of such questions does not transform the *Terry* stop into an arrest, *Quinn*, 815 F.2d at 157, and therefore the *Miranda* warnings were not required at that point. All of the other evidence gathered during the stop but prior to the search of the defendant was the result of his having offered to permit a vehicle search and his having volunteered the information that there was a marijuana joint in the ashtray of the pickup.

The *Terry* stop, the questioning conducted during the stop, and the subsequent body search of the defendant were lawful, and therefore the search warrant and evidence obtained incident to the stop and the body search were lawfully obtained.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress be denied.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 16th day of May, 1995.

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David M. Cohen
United States Magistrate Judge